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(1) Supreme Court, U.S.
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In The

# Supreme Court of the United States

DAVID E. DANNER, ESQ.,

*Petitioner*,

v.

COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION OF THE TENNESSEE SUPREME COURT, DAVID N. SHEARON,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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October 23, 2009

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# QUESTION

## I.

Whether *Young* permits standing to a federal plaintiff to challenge the constitutionality of a state law seeking general, prospective relief for all similarly situated persons – as opposed to seeking individual, remedial damages - wherein the plaintiff suffered no ultimate, actual injury but was individually threatened with actual enforcement of the challenged state law.

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## OPINIONS

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 2009 WL 1405190 (6th Cir. May 19, 2009). The opinion of the United States District Court for the Middle District of Tennessee is reported at 2008 WL 1859964 (M.D. Tenn. April 22, 2008).

## JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the opinion of the United States District Court for the Middle District of Tennessee, was filed on May 19, 2009. A timely petition for rehearing was denied on July 27, 2009. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## PROVISIONS

United States Constitution, Eleventh Amendment

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

United States Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the

> privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws. ...

*Tennessee Constitution, Article I – Declaration of Rights*

Tennessee Constitution, Article I, Section 8

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Rule 21 of the Tennessee Supreme Court

> *Section 7 - Noncompliance and Sanctions*
>
> 7.01 By March 31 of each year, the Commission [on Continuing Legal Education and Specialization] shall compile:
>
> (a) A list of those attorneys who did not timely file an Annual Report Statement for the preceding calendar year; and
>
> (b) A list of those attorneys who timely filed an Annual Report Statement indicating lack of compliance with the requirements of Section 3 of this Rule for the preceding calendar year; and

(c) A list of those attorneys who timely filed an Annual Report Statement indicating compliance with the requirements of Section 3 of this Rule for the preceding calendar year but who did not pay any and all fees due under Section 8.03 of this Rule.

7.02 On March 31 of each year, the Commission shall serve each attorney listed on any of the three foregoing lists a Notice of Non-completion requiring the attorney to remedy his/her deficiencies on or before May 31 of that year. The notice shall be served upon the attorney by registered or certified mail, return receipt requested, at the address shown in the most recent registration statement filed by the attorney pursuant to Supreme Court Rule 9, Section 20.5 or other last known address.

7.03 Each attorney to whom a Notice of Non-completion is issued shall pay to the Commission a non-completion fee of One Hundred Dollars ($100.00). Such non-completion fee shall be paid on or before May 31 of that year unless the attorney shows to the satisfaction of the Executive Director of the Commission that the Notice of Non-completion was erroneously issued, in which case no such fee is due.

7.04 Each attorney to whom a Notice of Non-completion is issued shall file an affidavit with the Commission on or before May 31 of that year showing that he or she has remedied his/her deficiencies. In the event an attorney fails to timely remedy his/her deficiencies or

fails to timely file such affidavit, the attorney shall pay to the Commission, in addition to the non-completion fee, a delinquent compliance fee of Two Hundred Dollars ($200.00).

7.05 On July 1 of each year, the Commission shall prepare a draft Suspension Order listing all attorneys who were issued Notices of Non-completion and who failed to remedy their deficiencies by May 31. The Commission shall submit the draft Suspension Order to the Supreme Court for informational purposes. The Commission also shall mail a copy of the draft Suspension Order to each attorney named in the draft Order by registered or certified mail, return receipt requested, to the address shown in the most recent registration statement filed by the attorney pursuant to Supreme Court Rule 9, Section 20.5 or other last known address.

7.06 On or before August 10, each attorney listed in the draft Suspension Order may file an affidavit in a form acceptable to the Commission showing compliance with Section 3 of this Rule for the preceding calendar year. Upon the Commission's approval of such affidavit and upon the attorney's payment of all outstanding fees, the Commission shall remove the attorney's name from the list of potential suspensions contained in the draft Suspension Order.

7.07 On August 15, the Commission shall submit to the Supreme Court a final Suspension Order listing all attorneys with active

Tennessee law licenses who failed to comply with this Rule for the preceding calendar year. Also on August 15, the Commission shall notify the Board of Professional Responsibility of the names of all licensed attorneys who have retired, taken inactive status, been suspended, or whose license to practice law in this state is otherwise inactive, and who failed to comply with the requirements of this Rule. The Supreme Court will review the final Suspension Order and, upon the Court's approval, shall enter the Suspension Order suspending the law license of each attorney listed in the order. The Board of Professional Responsibility shall not reactivate the license of any attorney whose license is suspended pursuant to this Rule until the Commission certifies completion of a program of remedial continuing legal education satisfactory to the Commission.

7.08 Each attorney named in the final Suspension Order entered by the Court or whose name is submitted to the Board of Professional Responsibility as ineligible for reactivation for failure to meet the requirements of this rule shall pay to the Commission a Five Hundred Dollar ($500) Suspension Fee as a condition of reinstatement of his or her law license. The suspension fee shall be paid in addition to the non-completion fee and the delinquent compliance fee.

7.09 Payment of all fees imposed in this section shall be a requirement for compliance with this Rule.

> 7.10 An attorney suspended or made ineligible for reactivation by the Commission pursuant to this Rule may file with the Commission an application for reinstatement demonstrating compliance with Section 3 of this Rule. If the application is satisfactory to the Commission, if the attorney is otherwise eligible for reinstatement, and if the attorney has paid in full all fees due under this Rule, the Commission will recommend to the Supreme Court that the Court reinstate the attorney's law license.
>
> 7.11 An attorney may request a hearing before the Commission in regard to a recommendation of suspension or a recommendation against reinstatement. Additionally, any attorney not finding suitable relief before the Commission may petition the Supreme Court for modification or reversal of actions of the Commission.

Tennessee Code Annotated 8-23-207

> [A]ny self-sustaining board, commission or agency created by the supreme court of Tennessee shall be deemed a state agency and all employees of such boards, commissions or agencies shall be deemed state employees and shall be entitled to the same rights and benefits enjoyed by other state employees. ...

Tennessee Code Annotated 8-23-204(a)(1)(C)

> 'State agency' means any department, commission, board, office or other agency of the

executive, legislative or judicial branch of state government.

*Tennessee Uniform Administrative Procedures Act, T.C.A. 4-5-101 et seq.*

Tennessee Code Annotated 4-5-102(2)

'Agency' means each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases ...

Tennessee Code Annotated 4-5-320 - Proceedings affecting licenses. —

**(a)** When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

**(b)** When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

**(c)** No revocation, suspension, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency

gave notice by mail to the licensee of facts or conduct that warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

(d) (1) Notwithstanding the provisions of subsection (c), in issuing an order of summary suspension of a license the agency shall use one (1) of the following procedures:

(A) The agency shall issue a notice to the licensee providing an opportunity for a prompt informal hearing, review or conference before the agency prior to the issuance of an order of summary suspension; or

(B) The agency shall proceed with the summary suspension and notify the licensee of the opportunity for an informal hearing, review or conference before the agency within seven (7) business days of the issuance of the order of summary suspension.

(2) The notice provided to the licensee may be provided by any reasonable means and shall inform the licensee of the reasons for the action or intended action of the agency and of the opportunity for an informal hearing, review or

> conference before the agency. The informal hearing, review or conference described by this subsection (d) shall not be required to be held under the contested case provisions of this chapter. The hearing, review or conference is intended to provide an informal, reasonable opportunity for the licensee to present the licensee's version of the situation to the person or entity authorized by law to summarily suspend the license involved. Whether the informal hearing, review or conference is held before or after an order of summary suspension, the sole issue to be considered is whether the public health, safety or welfare imperatively required emergency action by the agency.

## STATEMENT OF THE CASE

In compliance with the state-court regulations of respondent Commission on Continuing Legal Education and Specialization of the Tennessee Supreme Court, Petitioner Tennessee lawyer completed the continuing legal education (CLE) requirements of *Section 3.01, Rule 21, Tennessee Supreme Court*, via sitting, on or about December 29 and 30, 2005, for a sufficient number of hours in CLE courses offered to Tennessee lawyers by a private contractor authorized by *Section 5* of said Rule. Petitioner nevertheless received a Notice of Non-Completion dated March 31, 2006 alleging that Petitioner had not completed Tennessee's Rule for Mandatory Continuing Legal Education for the year 2005. Said notice required Petitioner to sit for 0.50 hours of Ethics/Professionalism credit and for 1.50 hours of General credit, by June 1, 2006. Said notice stated that a fee of $-0- was due from Petitioner for the

Notice of Non-Completion, and that a delinquent compliance fee of $200 would be due for any failure to complete alleged delinquent 2005 CLE hours and also an Affidavit of Completion, by June 1, 2006.

In compliance with such Notice of Non-Completion, Petitioner timely sat for two (2) additional hours in a CLE class on or about May 24, 2006 - which included a class discussion on ethics/professionalism - and timely completed and submitted respondents' Affidavit of Completion form to Respondents by June 1, 2006. Petitioner stated in the affidavit that 0.50 of EP/Dual hours and 1.50 of General hours were completed. Petitioner's affidavit was based on the content of the CLE course as perceived by Petitioner during his time sitting in class and learning from the instructors and other attendees of the CLE class which time included a class Q&A period on ethics and professionalism. Respondents issued an email to Petitioner stating that his affidavit was false or incorrect based on the official course description from the CLE provider that stated that the CLE class did not include an ethics and professionalism (EP) component. Respondents directed Petitioner to change his Affidavit of Completion to delete his stated 0.50 hours of EP credit and to pay the $200 delinquent compliance fee. Respondents classified CLE credit hours completed by Petitioner as "dual", "ethics and professionalism" (E/P), and "general hours" per *Section 3.01, Rule 21, Tennessee Supreme Court.*

Petitioner requested a hearing from Respondents on the issue of the actual content of the CLE course versus the program description of the course by the CLE provider. Respondents' regulations both grant presumptive approval to CLE providers for the content

of courses including requisite ethics content and permit after-the-fact approval of non-approved CLE courses, to wit:

> 5.02. Continuing legal education activities of worthy providers may be *presumptively approved* by the Commission, provided such provider demonstrates to the Commission that the provider has over a substantial period of time conducted CLE activities meeting the standards for approval.
>
> 5.03. Each provider approved for credit, will be responsible for including *ethics* education into its overall annual program.
>
> 5.05 ... Any provider *or Tennessee attorney* who has attended a CLE activity *not approved in advance* by the Commission may submit to the Commission similar material *on forms provided by the Commission* and *receive approval* of a program *after* the program is conducted. (emphases added)

*Sections 5.02, 5.03, and 5.05, Rule 21, Tennessee Supreme Court*. Nevertheless, respondent commission stated to Petitioner that it does not take testimony from Tennessee lawyers, it conducts no formal hearings, and it does not contact CLE providers and/or attorneys to determine the actual content of a particular course.[1] Petitioner was directed by

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[1] "An attorney may request a hearing before the Commission in regard to a recommendation of suspension or a recommendation

Respondents to pay the $200 delinquent compliance fee by July 3, 2006, or face summary suspension of his law license. Petitioner declined to pay the $200 delinquent compliance fee and Petitioner filed a Complaint in the U.S. District Court for the Middle District of Tennessee against Respondents on July 13, 2006. The District Court possessed subject matter jurisdiction over the federal constitutional claims therein pursuant to 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over the corresponding state constitutional claims therein pursuant to 28 U.S.C. 1367.

Respondents issued to Petitioner, and to hundreds of other Tennessee-licensed lawyers both statewide and out-of-state, a draft Order of Summary Suspension for Failure to Comply with the Rule for Mandatory Continuing Legal Education,[2] to wit:

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against reinstatement..." *Section 7.11, Rule 21, Tennessee Supreme Court*, infra.

[2] Furthermore, *Local Rule 83.01(e)(2)* of the U.S. District Court for the Middle District of Tennessee states:

> Whenever it has been made to appear to this Court that any member of the bar has been disbarred or suspended from practice by law by the *Disciplinary Board of the Supreme Court of Tennessee* or the courts or disciplinary bodies of any other state, or has been convicted of any crime involving moral turpitude in this Court or any other court, *he shall be suspended forthwith from practice before this Court*, and unless he shows good cause to the contrary within thirty (30) days from the date of such suspension, the Court may impose such further discipline it deems proper. (emphases added)

*See also Section 7.07, Rule 21, Tennessee Supreme Court* ("Also

> It having been represented to the [Tennessee Supreme] Court by the Commission on Continuing Legal Education and Specialization of the Supreme Court of Tennessee that the attorneys listed below have failed to comply with the requirements of Rule 21, and that the notices required by Sections 7.02 and 7.05 of said Rule have been timely mailed to said attorneys by certified mail, return receipt requested, the license to practice law in this State by each such attorney is hereby summarily suspended pursuant to Rule 21, Section 7.07.

Per *Section 4.03, Rule 21, Tennessee Supreme Court*, Petitioner had by that time earned four (4) CLE credit hours per college-credit hour taught at his *alma mater* Tennessee State University (TSU) as an adjunct professor of Business Law which was three (3) college-credit hours for each of those past prior seventeen (17) semesters, or two hundred four (204) CLE credit hours. Petitioner claimed these TSU credits on an affidavit dated and timely filed on August 10, 2006 per *Section 7.06, Rule 21, Tennessee Supreme Court*. Upon receipt of the TSU credits, respondent David N. Shearon, Executive Director of respondent

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on August 15, the *Commission shall notify the Board of Professional Responsibility of the names of all licensed attorneys who have* retired, taken inactive status, *been suspended*, or whose license to practice law in this state is otherwise inactive, and who failed to comply with the requirements of this Rule." [emphasis added]). Thus, perfunctory *Section 7.07* action by respondent commission leads to automatic disciplinary-board administrative action which in turn leads to summary federal-court suspension per *Local Rule 83.01(e)(2)*. *Id*.

commission, nevertheless sent to Petitioner a letter dated August 14, 2006 imposing additional requirements on Petitioner lawyer beyond the stated affidavit requirement of *Section 7.06* in order to avoid summary suspension scheduled for the next day, August 15, 2006, per *Section 7.07*.

Petitioner filed an emergency motion for a temporary restraining order on August 14, 2006 which was heard on August 18, 2006 whereupon Respondents relented on such *ulta vires* demands stated in the August 14, 2006 letter. But Petitioner lawyer was compelled to pay $201 on or about August 29, 2006 in order to avoid suspension of law licensure by the Tennessee Supreme Court. The District Court dismissed the case without prejudice providing Petitioner leave to re-open within sixty (60) days, whereupon Petitioner filed an amended complaint seeking prospective relief concerning the constitutionality of certain provisions of Rule 21 of the Tennessee Supreme Court.

On April 9, 2008, the Magistrate Judge issued a Report and Recommendation ruling on cross motions for summary judgment that *Section 7.11* is a constitutional *pre*-deprivation remedy, *infra*, which Petitioner failed to pursue after being denied a hearing by respondent commission. On April 22, 2008, the District Judge adopted the Report and Recommendation emphasizing that Petitioner's law license was not suspended, ruling impliedly that Petitioner thus possessed no standing-to-sue. Petitioner filed a timely notice of appeal on May 22, 2008.

On appeal, the U.S. Court of Appeals for the Sixth Circuit adopted, via summary disposition, the opinion of the U.S. District Court for the Middle District of Tennessee on May 19, 2009 - affirming expressly that Petitioner possessed no standing to sue because his law license was not suspended - without comment on the intra-circuit legal conflict briefed to the Sixth Circuit by Petitioner, *infra*. Petitioner filed a timely motion for rehearing on May 26, 2009 requesting that the Sixth Circuit independently review the substantive issues in Petitioner's appeal. The Sixth Circuit denied Petitioner's request for rehearing on July 27, 2009.

## ARGUMENT

### A. Reasons for granting Petition

Based on the fact patterns of *Adarand* and *Feldman* wherein civil rights plaintiffs were permitted to proceed on the merits despite no traditional standing via any form of individual injury wherein plaintiff Adarand had no entitlement to a federal contract and plaintiff Feldman had no prerogative to a bar examination whereby the denial of either by the federal or local government therein produced no such standing, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-212, 115 S.Ct. 2097, 2104-2105, 132 L.Ed.2d 158, 170-73 (1995), *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485-487, 103 S. Ct. 1303, 1316-1317, 75 L.Ed.2d 206, 224-25 (1983), it appears that a federal plaintiff nevertheless possesses relaxed standing to challenge the constitutionality of a federal or state law seeking general, prospective relief for all similarly situated persons – as opposed to seeking individual, remedial damages - despite such plaintiff having suffered no actual, traditional injury.

See Id. Therefore, Petitioner herein possessed a form of *jus tertii* or third-party standing, despite his ultimate retention of law licensure, to prospectively challenge the constitutionality of *Section 7.07* summary suspension pursuant to Fourteenth Amendment due process on behalf of all Tennessee lawyers, because such regulation remaining on the books permitting Respondents to wrongfully threaten Tennessee lawyers such as Petitioner with suspension without a pre-deprivation hearing, despite Petitioner's full compliance with Tennessee CLE rules, perpetuates a case or controversy concerning the constitutionality of a state rule. See Adarand, 515 U.S. at 210-212 citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136;[3] Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976); see also Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed.714 (1908).[4] However, neither *Adarand* nor *Feldman*

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[3] *Section 7.07* establishes a predictable, annual process that threatens Tennessee lawyers in a particularized, concrete manner; therefore, Petitioner being threatened with summary suspension despite being in CLE compliance provides third-party standing to Petitioner to advocate against the constitutionality of *Section 7.07*, concerning its prospective application, on behalf of other Tennessee lawyers without Petitioner having to suffer individual loss of licensure. See Adarand, 515 U.S. at 210-212; see also Young, 209 U.S. at 163-165, 28 S. Ct. at 455-456, 52 L.Ed. at 730-731.

[4] An exception to the *Rooker-Feldman* abstention doctrine - which doctrine prohibits state litigants from appealing final state-court rulings to federal district courts - permits American lawyers to challenge the constitutionality of state bar rules in federal district court seeking prospective, general equitable relief because such exception makes an apparent distinction between state-court rulings and state-court rules in applying fundamental abstention principles that bar a federal court from proscribing or reviewing

contains a definitive holding establishing the standards of such relaxed standing; therefore, this Court's deliberation of the Question contained herein would be a necessary contribution to the jurisprudence of standing-to-sue. See Id.[5] In *Young*, this Court opened the door to such a holding on relaxed standing that Petitioner did not have to suffer a loss of law licensure before challenging *Section 7.07* because the *Young* court reasoned that a federal litigant merely threatened with the application of a state law does not have to wait to be actually pursued or prosecuted in order to sue the appropriate state actor in federal court

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state-court rulings. See Feldman, 460 U.S. at 485-487, 103 S. Ct. at 1316-1317, 75 L.Ed.2d at 224-25 (1983). Such *Rooker-Feldman* abstention exception corresponds to the well-established Eleventh Amendment exemption that permits federal litigants to challenge the constitutionality of such state rules seeking prospective, general equitable relief. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed.714 (1908).

[5] Prior precedent concerning third-party standing does not serve to classify the relaxed standing that was applied in *Adarand* and *Feldman* and that is applicable to the instant case because an overbroad statute is not being facially challenged herein concerning solely First Amendment free speech. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988); Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S. Ct. 2839, 81 L.Ed.2d 786 (1984). However, *Sections 7.06* and *7.07* of Rule 21 of the Tennessee Supreme Court are impermissibly vague on their face under the Fourteenth Amendment due process overbreadth doctrine by failing to establish standards that are sufficient to guard against the arbitrary deprivation of constitutional rights, such as the August 14, 2006 letter from Respondents to Petitioner which contained requirements for Petitioner in addition to the standards stated in such regulations. City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

for prospective relief. Young, 209 U.S. at 163-165, 28 S. Ct. at 455-456, 52 L.Ed. at 730-731. But the *Young* court issued no such definitive holding on standing in addition to its seminal holding concerning the Eleventh Amendment. Id.

Because the Sixth Circuit denied Petitioner a federal proceeding on the merits concerning the prospective constitutionality of a state-court rule due to an intra-circuit conflict that is in opposition to the well-established Eleventh Amendment jurisprudence of this Court that permits federal litigants seeking prospective, general equitable relief to challenge the constitutionality of such state rules, *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed.714 (1908), the internal contradictions of the Sixth Circuit have compromised an important question of federal law that must be corrected by this Court concerning the Eleventh Amendment. Compare Dubuc v. Michigan Bd. of Law Examiners, 342 F.3d 610, 615 (6th Cir. 2003) (analyzing Eleventh Amendment concerning Michigan bar entities *with* multi-tiered, state-treasury Sixth Circuit standard, by a circuit panel) with Lawrence v. Chabot, 182 Fed. Appx. 442, 450 (6th Cir. 2006)(analyzing Eleventh Amendment concerning same Michigan bar entities *without* multi-tiered, state-treasury Sixth Circuit standard, by a separate circuit panel). Per one section of Sixth Circuit jurisprudence, Petitioner's claims could indeed proceed against respondent commission because such panel's Eleventh Amendment analysis considers the primary issue of determining whether an entity is a state agency as whether the state would ultimately be liable for any money judgment. Dubuc, 342 F.3d at 615 ("To determine whether an entity is a state department or agency for purpose of the Eleventh Amendment, the

primary issue is whether the state would ultimately be liable for any money judgment against the entity") citing Brotherton v. Cleveland, 173 F.3d 552, 560-61 (6th Cir. 1999).[6] In sum, a self-financed state agency can be sued in federal court. See Id. Per another section of Sixth Circuit jurisprudence ironically citing *Dubuc* concerning the same state bar parties at issue in *Dubuc*, Petitioner's claims could not proceed against respondent commission because such alternate panel's Eleventh Amendment analysis considers the sole issue as whether such entities were arms of the state of

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[6] The *Dubuc* panel of the Sixth Circuit found that the parties to that case had simply submitted *no evidence* regarding whether the State of Michigan would have been ultimately responsible for any money judgment against the board or the bar in that case, and thus a determination was made in favor of Eleventh Amendment immunity on other secondary factors, 342 F.3d at 615 (citing the *Brotherton* court as "declining to decide whether these other factors are relevant to the inquiry"). Therefore, respondent state agency herein conversely could be sued in federal court per its own evidentiary *admissions* stated in Petitioner's complaint, to wit:

> Defendant Commission on Continuing Legal Education and Specialization of the Tennessee Supreme Court is a board created by the Tennessee Supreme Court and is thus an agency of the State of Tennessee employing persons who are employees of the State of Tennessee, pursuant to T.C.A. 8-23-207. Per *Sections 8.02, 8.03, and 8.05 of Rule 21 of the Tennessee Supreme Court*, defendant commission is self-financed by annual taxes on Tennessee lawyers. Defendant commission can be sued in federal district court. Defendant commission is administratively and financially autonomous from the State of Tennessee to a degree that a judgment against it would not touch the Tennessee state treasury, per *Section 8.05 of Rule 21 of the Tennessee Supreme Court*. Defendant commission possesses no immunity from suit in federal court via the Eleventh Amendment to the U.S. Constitution.

Michigan. Chabot, 182 Fed.Appx. at 450. In sum, any state function performed by an agency bars a suit in federal court. See Id. In other words, the standard of the *Chabot* panel is the *arm of the state* standard whereas the standard of the *Dubuc* panel is the *self-financed agency* standard wherein these competing standards create confusion of precedent because self-financed agencies that exercise state-court functions, such as respondent commission,[7] exist in a procedural purgatory within the Sixth Circuit wherein there is no confirmed classification to effectively guide litigation concerning any exemption from the Eleventh Amendment. See Id.[8] Thus, this Court's resolution of such intra-circuit conflict is critical concerning the

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[7] Respondents' regulations indicate and establish that agency funds are held merely in trust by the state treasury as solely agency funds without becoming actual Tennessee state treasury funds, to wit:

> The Commission shall deposit all funds collected hereunder with the State Treasurer; all such funds including earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds *belonging solely* to the Commission ...

*Section 8.05, Rule 21, Tennessee Supreme Court.* (emphasis added).

[8] Pursuant to 28 U.S.C. 1367, respondent state agency - in addition to respondent state actor - can be sued in federal court for supplemental state claims because, *inter alia*, a state agency is a "person", pursuant to T.C.A. 4-5-102(9), for the purpose of Petitioner's state claims under the Tennessee Constitution, as opposed to both 42 U.S.C. 1983 "person" and *Young* Eleventh Amendment analyses against such government entities being valid parties in federal court.

proper weighing of available prospective relief under *Young* that may permissibly impact a state treasury and *a fortiori* permissibly impact the finances of a self-financed state agency as an ancillary effect of such relief despite the Eleventh Amendment. See Edelman v. Jordan, 415 U.S. 651, 667-668, 94 S. Ct. 1347, 1357-1358, 39 L.Ed.2d 662, 675 (1974).

Therefore, the time has come for further progression of the progeny of *Young* in order to resolve practical and pressing problems of standing left pending by these cases and controversies concerning constitutional challenges to state-court rules in federal court seeking general, prospective relief brought by lawyers who have been threatened with actual enforcement of these state laws. See Adarand, 515 U.S. at 210-212; Feldman, 460 U.S. at 485-487; Young, 209 U.S. at 163-165.

### B. Rules of the Tennessee Supreme Court offend the United States Constitution

Pursuant to *Section 7.07* of Rule 21 of the Tennessee Supreme Court, any Tennessee lawyer can be disbarred or suspended without a pre-deprivation hearing for an alleged failure to complete continuing legal education (CLE) requirements; therefore, *Section 7.07* is unconstitutional because such summary suspension offends the procedural due process clause of the Fourteenth Amendment to the United States Constitution. See e.g. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18, 33 (1976); Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 6

L.Ed.2d 1230 (1961).[9] In this type of case, procedural due process specifically requires an evidentiary hearing *before* summary suspension of law licensure is implemented pursuant to *Section 7.07*. Zinermon v. Burch, 494 U.S. 113, 136-39, 110 S. Ct. 975, 989-90, 108 L.Ed.2d 100, 120-22 (1990). First, it is not unforeseeable that a Tennessee lawyer could be suspended under said rule. Id. at 136. Second, it is not impossible for Respondents to hold a pre-deprivation evidentiary hearing before a *Section 7.07* suspension is implemented because the Respondents make provision for a post-deprivation hearing in *Section 7.11*. Id. at 136-137.[10] Third, Respondents are

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[9] Thus, *Local Rule 83.01(e)(2)[M.D.Tenn]* is also unconstitutional as a matter of law. 28 U.S.C. 2072(b); In re Ruffalo, 370 F.2d 447, 449 (6th Cir. 1966) rev'd on other grounds In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); see also Theard v. United States, 354 U.S. 278, 77 S. Ct. 1274, 1 L.Ed.2d 1342 (1957). In 1966, the Sixth Circuit recognized and ruled citing *Theard* that its internal rules could have been read as automatically striking lawyers from practice before its court based on state rulings and it thus amended its rules. Ruffalo, 370 F.2d at 449. But the U.S. District Court for the Middle District of Tennessee retains a similarly offending rule with impunity. Id.

[10] Despite the faulty reasoning of the Report and Recommendation, *Section 7.11* is an unconstitutional post-deprivation remedy as opposed to a constitutional pre-deprivation remedy because (1) the *Section 7.11* hearing is physically positioned and published several sections after the *Section 7.07* summary suspension provision – wherein the interstices amid *7.07* and *7.11* govern actually suspended lawyers - as opposed to being placed before the *Section 7.07* suspension section, and (2) *Section 7.11* permits a Tennessee lawyer to seek relief from the Tennessee Supreme Court only to modify or reverse an action taken by respondent commission, thereby implying that the respondent may engage in summary suspension before such

delegated, assigned, or granted powers by the Tennessee Supreme Court via its Rule 21 which bureaucratic deliberation gravitates against the random, unauthorized deprivation of constitutionally protected interests that would justify the government being relieved of any pre-deprivation evidentiary hearing. Id. at 138, 115, 129-130 citing Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420 (1981), Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). Therefore, *Section 7.07* violates the Fourteenth Amendment to the U.S. Constitution because the general principles of due process dictate pre-determination due process, as opposed to post-determination due process, by the state-court agency herein. Zinermon, 494 U.S. at 136-39, 110 S. Ct. at 989-90, 108 L.Ed.2d at 120-22; *compare* T.C.A. 4-5-102(2), T.C.A. 4-5-320(c), T.C.A. 8-23-204(a)(1)(C), T.C.A. 8-23-207 *with* Mistretta v. United States, 488 U.S. 361, 384-385, 388-389, 393-394, 394 ftnt. 20, 109 S.Ct. 647, 661, 663-664, 665-666, 666 ftnt. 20, 102 L.Ed.2d 714, 738-39, 740-41, 743-44, 744 ftnt. 20 (1989)(holding that a federal-court agency is subject to the due process standards of the federal Administrative Procedure Act).[11]

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lawyer may proceed to the state high court for "modification" or "reversal" of such action. *Section 7.11, Rule 21 of the Tennessee Supreme Court.*

[11] *Section 7.07* of Rule 21 of the Tennessee Supreme Court is unconstitutional pursuant also to the state due process standards of Tennessee, TENN. CONST., Art. I, Sec. 8, because said CLE-enforcement rule permits an administrative agency of the state high court to impose summary suspension on the professional license of a Tennessee lawyer without the specific pre-deprivation findings and other specified due process required by the Tennessee Administrative Procedures Act (TAPA), to wit:

## CONCLUSION

Based on the arguments above, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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> If the agency finds that public health, safety, or welfare *imperatively requires* emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.

T.C.A. 4-5-320(c)[emphasis added]. Despite the unlawful efforts of the Tennessee Supreme Court to exempt itself from the due process provisions of the United States Constitution and the Tennessee Constitution via its various summary suspension and sanctions powers, *Section 7.07 of Rule 21 of the Tennessee Supreme Court, Section 8.1 of Rule 9 of the Tennessee Supreme Court, Section 4.3 of Rule 9 of the Tennessee Supreme Court*, such state administrative procedures statute applies nevertheless to respondent Commission on Continuing Legal Education and Specialization of the Tennessee Supreme Court because said commission is a T.C.A. 8-23-207 and T.C.A. 8-23-204(a)(1)(C) "state agency" subject to TAPA, per T.C.A. 4-5-102(2). Therefore, such state-court agency is not itself a "court" exempt from the administrative due process provisions of TAPA, per T.C.A. 4-5-106(a). See Mistretta v. United States, 488 U.S. 361, 384-385, 388-389, 393-394, 394 ftnt. 20, 109 S.Ct. 647, 661, 663-664, 665-666, 666 ftnt. 20, 102 L.Ed.2d 714, 738-39, 740-41, 743-44, 744 ftnt. 20 (1989)(holding that a federal-court agency - despite its presence under the judicial branch - is not a court and does not exercise judicial power because it is an independent agency subject to the due process dictates of the federal Administrative Procedure Act); see also State v. Thompson, 197 S.W.3d 685, 691 (Tenn. 2006)(holding that the phrase "state agency" was operative to invoke TAPA provisions in that case).

Respectfully Submitted,

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Antioch, TN 37011-1307
615.596.5460

*Pro Se*

# APPENDIX

## APPENDIX A

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**No. 08-5660**

**[Filed May 19, 2009]**

| | |
|---|---|
| DAVID E. DANNER, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION OF THE TENNESSEE SUPREME COURT, | ) |
| | ) |
| Defendant-Appellee. | ) |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: GUY, GILMAN, and COOK; Circuit Judges.

PER CURIAM. David D. Danner sued the Tennessee Commission on Continuing Legal Education

and Specialization of the Tennessee Supreme Court (the "Commission") and its Executive Director, David N. Shearon. Though never sanctioned, Danner challenges the constitutionality of procedures–both of the Tennessee Supreme Court and the Middle District of Tennessee–for suspending an attorney. With this summary disposition we affirm the district court's dismissal of Danner's challenge to Middle District of Tennessee Local Rule 83.01 on standing grounds, we affirm its dismissal of Danner's suit against the Commission as barred by the Eleventh Amendment, and we dismiss as moot Danner's claims against Shearon challenging Tennessee Supreme Court Rule 21.

### A. No standing to challenge the constitutionality of Local Rule 83.01.

The panel adopts the reasoning and conclusion of the district court that the absence of a showing of any injury to Danner by enforcement of the rule against him deprives him of standing.

### B. The Eleventh Amendment immunizes the Commission from suit in federal court.

Assuming Danner could establish standing at the time he filed his complaint–he faced an imminent threat of injury with the Commission's pending draft order of summary suspension–we adopt the district court's reasoning and conclusion that the Eleventh Amendment barred Danner's suit because the Commission is a state agency. We likewise endorse the district court's footnote refuting Danner's argument premised on the self-funded nature of the Commission and its activities.

### C. Danner's claims against Shearon fail on mootness grounds.

The mootness doctrine requires that a justiciable case or controversy continue to exist throughout the litigation. According to the Defendants, Danner currently faces no threat of suspension for failure to comply with the CLE requirements. We therefore dismiss as moot Danner's complaint against Shearon.

Contrary to Danner's argument, both the *Rooker-Feldman* doctrine and its exception are inapposite. *Rooker-Feldman* bars a losing party in state court from seeking federal court review of the state court judgment. Exceptions to *Rooker-Feldman* are not exceptions to Article III's justiciability requirements.

**AFFIRMED**

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**Case No. 3:06-0687**
**Judge Echols**

**[Filed April 22, 2008]**

| | |
|---|---|
| DAVID E. DANNER, ESQ., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION OF THE TENNESSEE SUPREME COURT, and DAVID SHEARON | ) |
| | ) |
| Defendants. | ) |

**ORDER**

This matter is before the Court on a Report and Recommendation ("R&R") (Docket Entry No. 65) in which the Magistrate Judge recommends granting Defendant David Shearon's Motion for Summary Judgment (Docket Entry No. 43), denying Plaintiff's Motion to Repeal Local Rule 83.01(e)(2) (Docket Entry

No. 52), denying Plaintiff's Motion for Summary Judgment (Docket Entry No. 60), and dismissing this action. Plaintiff, pro se, has filed an "Objection to Report and Recommendation" (Docket Entry No. 66).

Where a party makes timely objections to a Report and Recommendation, the Court "shall make a *de novo* determination of the matter and may conduct a new hearing, take additional evidence, recall witnesses, recommit the matter to the Magistrate Judge for further proceedings and consideration, conduct conferences with counsel for the affected parties, and receive additional arguments, either oral or written, as the District Judge may desire." L.R.M.J. 9(b)(3). This Court's *de novo* review leads it to conclude the Magistrate Judge appropriately set out the arguments and positions of the parties and correctly applied the law to the facts of this case.

Plaintiff's objections are mainly a rehashing of the arguments raised in opposition to Defendant Shearon's Motion for Summary Judgment and those made in support of his own Motion for Summary Judgment. Each of those arguments was properly considered and correctly resolved by the Magistrate Judge.

Plaintiff claims the R & R is objectionable because it recommends denial of Plaintiff's Motion to Repeal Local Rule 83.01(e)(2) which provides that one who has been suspended or disbarred from the practice of law by the Disciplinary Board of the Supreme Court of Tennessee shall be suspended from practice before this Court unless he or she shows good cause to the contrary. Plaintiff claims that the Court should sua sponte repeal Local Rule 83.01(e)(2) based upon the

Sixth Circuit's decision in In re Buffalo, 370 F.2d 447 (6th Cir. 1966).

Actually, the name of the case is In Re Ruffalo. Moreover, the decision of the Sixth Circuit that Petitioner in that case should be disbarred from the practice of law based solely upon findings of the Ohio Supreme Court was reversed by the Supreme Court. In re Ruffalo, 390 U.S. 544 (1968).

In any event, this case is not like In Re Ruffalo. As the Magistrate Judge correctly observed, Plaintiff was never suspended from the practice of law by the Tennessee Supreme Court and therefore he was never threatened with a summary suspension from this Court under Local Rule 83.01(e)(2). Further, the only remaining Defendant in this action is David Shearon, the Executive Director of the Tennessee Commission on Continuing Legal Education and Specialization ("Commission"), and he is not a Defendant against whom relief could be granted since he has no input into the application or implementation of this Court's Local Rules.

"It is a fundamental principle of American jurisprudence that before a party may bring a case before a court, he must have standing to do so," and this applies to challenges to Local Rules of practice. Nat'l Assoc. for Advancement of Multijuridiction Practice v. Gonzalez, 211 Fed. Appx. 91, 94 (3d Cir. 2006). "[T]he irreducible constitutional minimum of standing contains three elements" a plaintiff must prove, and those are injury in fact, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Plaintiff has established none of these elements.

Plaintiff also challenges the Magistrate Judge's conclusion regarding the application of Rule 21 of the Rules of the Tennessee Supreme Court relating to suspensions for failure to comply with Continuing Legal Education ("CLE") requirements. The Magistrate Judge accurately summarized the applicable Rule as follows:

> As dictated by § 7.07 of Rule 21, when an attorney in Tennessee fails to timely satisfy his annual CLE obligation and pay all requisite fees, he is subject to the suspension of his license to practice law. Before the suspension of his license, however, the Commission is required to provide the lawyer with notice of his deficiency. Rule 21, § 7.02. The attorney is then given an opportunity to cure the deficiency and notify the Commission of his compliance. Id. at § 7.04. If the attorney still has not met his CLE obligation, the Commission annually will draft a "Suspension Order to the Supreme Court for informational purposes", a copy of which is sent to the delinquent lawyer. Id. at § 7.05. All attorneys listed in the draft Suspension Order may then file an affidavit with the Commission showing completion of the CLE requirement. Id. at § 7.06. If no such affidavit is forthcoming, a final Suspension Order is sent to the Supreme Court for consideration. Id. at § 7.07.

(Docket Entry No. 65 at 6).

In this case, Plaintiff does not challenge the Magistrate Judge's summary of Rule 21 or Plaintiff's effort to comply with that Rule and the Commission's response to that effort. Instead he objects because the

Magistrate Judge categorized Section 7.11 of Rule 21 as allowing for a pre-deprivation hearing when in fact lawyers face suspension without a pre-deprivation hearing. In Plaintiff's view, this post-deprivation hearing violates due process.

Leaving aside that Plaintiff was never suspended because he paid the delinquent non-compliance fee, Section 7.11 is not couched merely in terms of a post-deprivation hearing. Instead, that Section reads:

> An attorney may request a hearing before the Commission in regard to a recommendation of suspension or a recommendation against reinstatement. Additionally, any attorney not finding suitable relief before the Commission may petition the Supreme Court for modification or reversal of actions of the Commission.

Rule 21, § 7.11 of the Rules of the Tennessee Supreme Court.

While Plaintiff claims he was threatened with suspension of his license before any hearing, the fact remains that his license was not suspended. When the Commission allegedly told him that it would not hold a hearing on his challenge to the Commission's refusal to credit him with certain hours for CLE, Plaintiff did not challenge that decision before the Tennessee Supreme Court as provided for in Rule 7.11.

"Due process is flexible and calls for such procedural protections as the particular situation demands.'" Mathews v. Eldridge, 424 U.S. 319, 334 (1976)(citation omitted). "At a minimum, however,

'[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Neinast v. Bd. of Trustees of Columbus, 346 F.3d 585, 597 (6th Cir. 2003)(quoting, Goss v. Lopez, 419 U.S. 565, 579 (1975)).

Considering the summary judgment record, the Court finds that Rule 21 of the Tennessee Supreme Court provides due process in that it requires notice and allows for an opportunity to be heard before the suspension or revocation of a law license. See, Matter of Smith, 939 P.2d 422, 424 (Ariz. 1997)(upholding against due process and equal protection challenge Arizona rule which provided for summary suspension for non-compliance with CLE requirements where lawyers were sent notice and could comply by filing an affidavit of delinquent compliance). Accordingly, Plaintiff's objections relating to the Magistrate Judge's analysis of Rule 21 will be overruled.

Prior to closing, the Court notes that Defendant Shearon has filed a response to Plaintiff's Objection, stating he has no objection to the R & R. However, he asserts the R & R does not resolve the "important issue" of whether "plaintiff or any other attorney is entitled to a pre-deprivation hearing for the purpose of debating matters of policy" that lie "within the discretion of the CLE Commission." (Docket Entry No. 68 at 1-2). In this case, the Court need not resolve the issue of whether the Commission complies with the mandate of Rule 21 where an attorney raises a matter of policy, because the record shows the Rule requires pre-deprivation notice, which Plaintiff received in this case, and provides for the opportunity to be heard ultimately by the Supreme Court, which Plaintiff did not pursue.

Based on the foregoing, the Court rules as follows:

(1) the R&R (Docket Entry No. 65) is hereby APPROVED and ADOPTED;

(2) Plaintiff's Objection to Report and Recommendation (Docket Entry No. 66) is hereby OVERRULED;

(3) Defendant Shearon's Motion for Summary Judgment (Docket Entry No. 43) is hereby GRANTED;

(4) Plaintiff's Motion to Repeal Local Rule 83.01(e)(2) (Docket Entry No. 52) is hereby DENIED;

(5) Plaintiff's Motion for Summary Judgment (Docket Entry No. 60) is hereby DENIED; and

(6) This case is hereby DISMISSED WITH PREJUDICE.

Entry of this Order on the docket shall constitute entry of a final judgment in accordance with Federal Rules of Civil Procedure 58 and 79(a).

It is so ORDERED.

/s/
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 08-5660**

**[Filed July 27, 2009]**

| | |
|---|---|
| DAVID E. DANNER, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION OF THE TENNESSEE SUPREME COURT, | ) |
| | ) |
| Defendant-Appellee. | ) |

ORDER

**BEFORE:** GUY, GILMAN, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/
Leonard Green
Clerk

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**No. 3:06-0687**
**Echols/Brown**

**[Filed April 9, 2008]**

| | |
|---|---|
| DAVID E. DANNER, Esq. | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION OF THE TENNESSEE SUPREME COURT and DAVID SHEARON | ) |
| Defendants. | ) |

To: Honorable Robert L. Echols, Senior District Judge

**REPORT AND RECOMMENDATION**

By an order (Docket Entry No. 33) entered June 27, 2007, the Court referred this action to the Magistrate Judge "pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) for pre-trial case management, decisions on all pre-trial, non-dispositive motions, and the issuance of a

Report and Recommendation on any dispositive motion."

Presently pending before the Court is a Motion for Summary Judgment (Docket Entry No. 43) from the defendant, David Shearon; plaintiff's Response in Opposition to the Motion for Summary Judgment (Docket Entry No. 46); plaintiff's Motion to Repeal Local Rule 83.01(e)(2)(Docket Entry No. 52); plaintiff's Motion for Summary Judgment (Docket Entry No. 60); and defendant's pleading in Opposition to Plaintiff's Motion for Summary Judgment (Docket Entry No. 63).

The undersigned has conducted a review of these pleadings and the record in this case and respectfully recommends, for the reasons stated below, that plaintiff's Motion for Summary Judgment lacks merit and should be denied. It is further recommended that plaintiff's Motion to Repeal Local Rule 83.01(e)(2) also be denied. Finally, the Magistrate Judge finds merit in the defendant's Motion for Summary Judgment. Consequently, said motion should be granted and this action be dismissed.

## I. Background

The plaintiff, proceeding *pro se*, is an attorney from Antioch, Tennessee. In order to maintain his Tennessee law license in good standing, he is required each calender year to attend, or complete an approved substitute for attendance, a minimum of twelve (12) hours of approved continuing legal education (CLE). Beyond this, the plaintiff must complete three additional hours "of approved continuing legal education in courses dealing with ethics and

professionalism." Rule 21, § 3.01 of the Rules of the Tennessee Supreme Court.

On March 31, 2006, the plaintiff received a Notice of Non-Completion from the Commission on Continuing Legal Education and Specialization (Commission) informing him that he had not earned enough CLE credits for 2005. More specifically, the plaintiff was told that he was short 1.5 hours of general CLE credit and 0.5 hours of ethics/professionalism credits. The Notice of Non-Completion stated that the plaintiff had until June 1, 2006 in which to submit to the Commission an affidavit certifying that he had cured this deficiency or face a delinquent compliance fee of two hundred dollars ($200). Docket Entry No. 20 at pg. 4, ¶ 10.

On May 24, 2006, the plaintiff attended a seminar entitled "How To Successfully Collect on Judgments" to earn the CLE hours he needed. Docket Entry No. 10; Exhibit A. He sent the Commission an affidavit attesting to his attendance at the class. "Plaintiff's affidavit was based on the content of the CLE course *as perceived by the Plaintiff* during his time sitting in class and learning from the instructors and other attendees of the CLE class which time included a class Q&A period on ethics and professionalism" (emphasis added). Docket Entry No. 61 at pg. 2, ¶ 3.

Apparently, the official course description provided to the Commission by the CLE provider stated that the class did not include an ethics/professionalism component. Consequently, the plaintiff was informed by e-mail that his affidavit was inaccurate because he

remained short 0.5 hours of ethics training.[1] The plaintiff was directed to amend his affidavit and submit the delinquent compliance fee or face summary suspension of his law license. Docket Entry No. 20 at pg. 5, ¶ 13. On August 30, 2006, the plaintiff paid the delinquent compliance fee to avoid the loss of his law license.[2]

## II. Procedural History

On July 13, 2006, the plaintiff filed a *pro se* complaint (Docket Entry No. 1) initiating this action. He named the Commission and its Executive Director, David Shearon, as defendants and sought declaratory, injunctive and monetary relief.[3] The plaintiff's claims included defamation, violations of the First, Fifth and Fourteenth Amendments, retaliation, conspiracy, and violations of the Tennessee Constitution.

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[1] The Commission sent the plaintiff an Annual Report Statement dated July 21, 2006 which reflects the total CLE credits accrued by him for the calender year 2005. Docket Entry No. 10; Exhibit A.

[2] At a hearing before Judge Haynes on August 18, 2006, the Commission agreed to credit the plaintiff for time spent teaching business law as an adjunct professor at Tennessee State University. This resolved the issue of completing enough credits to satisfy plaintiff's CLE obligation for 2005. The plaintiff did not seek a waiver of the delinquent compliance fee. Docket Entry No. 32 at pgs. 3-5.

[3] The case was originally assigned to the Honorable William J. Haynes, Jr. However, by an order (Docket Entry No. 27) entered on November 14, 2006, Judge Haynes recused himself and the case was reassigned to the docket of the Honorable Robert L. Echols.

In August, 2006, based upon statements made by the parties in open court, this action was dismissed without prejudice as moot. Docket Entry No. 15. Shortly thereafter, though, the plaintiff filed a motion to reopen the case (Docket Entry No. 19) along with an amended complaint (Docket Entry No. 20). By an order (Docket Entry No. 33) entered June 27, 2007, the plaintiff's motion to reopen this case was granted. All claims against the Commission were dismissed. The order also dismissed all claims against David Shearon for past alleged violations of the plaintiff's rights. It was further noted, however, that "Plaintiff's claims for prospective declaratory and injunctive relief in regard to the application and constitutionality of Tennessee Supreme Court Rule 21 will remain pending." Docket Entry No. 33 at pg. 2.

## III. Standard of Review

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." In order to prevail on a motion for summary judgment, the moving party must demonstrate that no genuine issue of material fact exists and that judgment as a matter of law should be granted in the moving party's favor. Smith v. Hudson, 600 F.3d 60, 63 (6th Cir. 1979).

In considering a motion for summary judgment, the Court must view all facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. SEC v. Blavin, 760 F.2d 706 (6th Cir.

1985). The non-moving party, however, may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. Celotex Corporation v. Catrett, 106 S.Ct. 2548, 2553 (1986).

Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. Id., at 477 U.S. 248. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. First National Bank of Arizona v. Cities Service Co., 88 S.Ct. 1575 (1968).

## IV. Analysis of the Claims

### A.) Procedural Due Process

The Fourteenth Amendment prohibits States from depriving its citizens of life, liberty or property without due process of law. Wolff v. McDonnell, 94 S.Ct. 2963 (1974). The procedural component of the Due Process Clause requires a State to provide an individual with an opportunity to be heard in a meaningful manner before the decision is made to infringe upon his life, liberty or property. Loudermill v. Cleveland Board of

Education, 721 F.2d 550, 563 (6th Cir. 1983), *aff'd* 105 S.Ct. 1487 (1985).

An attorney has a property interest in his law license, and he maintains that property interest by complying with the annual administrative requirements set forth by the state body authorized to govern the licensing of local attorneys. *See* Greening v. Moran, 739 F.Supp. 1244, 1251-52 (C.D. Ill. 1990). Thus, the suspension of an attorney's license to practice law does have due process implications. In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972).

The plaintiff's due process claims are predicated on his belief that "Section 7.07 of Rule 21 of the Tennessee Supreme Court is unconstitutional pursuant to both state-standard and federal-standard due process arising from the absence of a predetermination hearing prior to the suspension from law practice of the Tennessee lawyer." Docket Entry No. 60.

Section 7.07 of Rule 21 of the Tennessee Supreme Court states as follows :

> On August 15, the Commission shall submit to the Supreme Court a final Suspension Order listing all attorneys with active Tennessee law licenses who failed to comply with this Rule for the preceding calender year. Also on August 15, the Commission shall notify the Board of Professional Responsibility of the names of all licensed attorneys who have retired, taken inactive status, been suspended, or whose license to practice law in this state is otherwise inactive, and who failed to comply with the

> requirements of the Rule. The Supreme Court will review the final Suspension Order and, upon the Court's approval, shall enter the Suspension Order suspending the law license of each attorney listed in the order. The Board of Professional Responsibility shall not reactivate the license of any attorney whose license is suspended pursuant to this Rule until the Commission certifies completion of a program of remedial continuing legal education satisfactory to the Commission.

As dictated by § 7.07 of Rule 21, when an attorney in Tennessee fails to timely satisfy his annual CLE obligation and pay all requisite fees, he is subject to the suspension of his license to practice law.[4] Before the suspension of his license, however, the Commission is required to provide the lawyer with notice of his deficiency. Rule 21, § 7.02. The attorney is then given an opportunity to cure the deficiency and notify the Commission of his compliance. Id. at § 7.04. If the attorney still has not met his CLE obligation, the Commission annually will draft a "Suspension Order to the Supreme Court for informational purposes", a copy of which is sent to the delinquent lawyer. Id. at § 7.05. All attorneys listed in the draft Suspension Order may then file an affidavit with the Commission showing completion of the CLE requirement. Id. at § 7.06. If no such affidavit is forthcoming, a final Suspension Order is sent to the Supreme Court for consideration. Id. at § 7.07.

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[4] "Payment of all fees imposed in this section shall be a requirement for compliance with this Rule". Rule 21, § 7.09 of the Rules of the Tennessee Supreme Court.

The plaintiff does not dispute the fact that he received ample notification that his license was in jeopardy because of a shortage of appropriate CLE credits. Docket Entry No. 20 at pg. 4, ¶¶ 10-12. The attorney "may request a hearing before the Commission in regard to a recommendation of suspension or a recommendation against reinstatement. Additionally, any attorney not finding suitable relief before the Commission may petition the Supreme Court for modification or reversal of actions of the Commission." Rule 21, § 7.11. Clearly then, contrary to the plaintiff's contention, Rule 21 of the Rules of the Tennessee Supreme Court does provide for a pre-deprivation remedy for the suspension of a law license. The plaintiff has alleged that he requested a hearing with the Commission on the issue of the actual content of the CLE course versus the program description of the course by the CLE provider but that his request for a hearing was denied. Docket Entry No. 20 at pg. 5, ¶ 14. Apparently, though, he did not then petition the Tennessee Supreme Court as allowed by Rule 21.[5] As a consequence, he failed to avail himself of every opportunity provided by Rule 21 to challenge the impending suspension of his law license. Rule 21, then, by its terms, does provide for notice and a

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[5] In their cross Motions for Summary Judgment, the parties debate the applicability of the Tennessee Administrative Procedures Act Tenn. Code Ann. § 4-5-101, et seq. This legislation sets forth the requirements for due process prior to the summary suspension of a professional license in Tennessee. § 4-5-320(d)(1). Having determined that the plaintiff did have notice and an opportunity to respond prior to the suspension of his law license, the question of whether the Tennessee Administrative Procedures Act is applicable to this situation has been rendered moot.

hearing sufficient to satisfy the requirements of the Due Process Clause.

**B.) Equal Protection**

The plaintiff has also alleged that Rule 21 is violative of the right of Tennessee attorneys to the equal protection of the law. Docket Entry No. 20 at pg. 7, ¶ 18. More specifically, he contends that Rule 21 denies Tennessee attorneys the same notice and hearing available to other professionals prior to the suspension of their licenses.

The Equal Protection Clause prohibits states from making "distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." Radvansky v. City of Olmstead Falls, 395 F.3d 291, 312 (6th Cir. 2005). As noted above, Rule 21 does provide Tennessee attorneys with notice and hearing prior to the suspension of a law license. Accordingly, attorneys in Tennessee are not treated differently than other licensed professionals and plaintiff's equal protection claim fails for that reason.

**C.) Motion to Repeal Local Rule 83.01(e)(2)**

The plaintiff has moved the Court to repeal its Local Rule 83.01(e)(2). The rule provides for the suspension from practice before this Court of any attorney who "has been disbarred or suspended from practice of law by the Disciplinary Board of the Supreme Court of Tennessee or the courts or disciplinary bodies of any other state, or has been convicted of any crime involving moral turpitude in

this or any other court .....". The plaintiff believes that the summary suspension from practice before this Court envisioned by the rule is violative of due process.

The plaintiff's law license was never actually suspended by the Tennessee Supreme Court. Therefore, the plaintiff was never threatened with a summary suspension from practice before this Court pursuant to Local Rule 83.01(e)(2). Thus, he lacks standing to challenge the rule in question. Moreover, the only defendant left in this lawsuit is David Shearon who, as Executive Director of the Commission, has no authority or imput over the enactment or enforcement of the local rules of a federal district court. Consequently, there is no defendant in this action from whom this relief can be provided. Consequently, plaintiff's motion to repeal has no merit and should be denied.

## RECOMMENDATION

Upon consideration of the pleadings and the record in this case, the undersigned respectfully RECOMMENDS that the plaintiff's Motion for Summary Judgment lacks merit and should be DENIED. It is further RECOMMENDED that plaintiff's Motion to Repeal Local Rule 83.01(e)(2) also be DENIED. The defendant's Motion for Summary Judgment should be GRANTED and this action should be DISMISSED.

Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice and must state with particularity the specific portions of the Report and Recommendation to which objection is made. Failure

to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order regarding the Report and Recommendation. *See* Thomas v. Arn, 106 S.Ct. 466 (1985); United States v. Walters, 638 F.2d 947 (6th Cir.1981).

Respectfully submitted,

/s/_____
Joe B. Brown
United States Magistrate Judge